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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 540

FRANK W. WIESNER,

Petitioner,

v.

THE STATE OF MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT FOR BALTIMORE COUNTY

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The Petitioner, Frank W. Wiesner, respectfully prays that a Writ of Certiorari issue to review the judgment of the Circuit Court for Baltimore County, State of Maryland, entered in the above captioned case on April 1, 1965.

OPINIONS BELOW

The opinion of the Circuit Court for Baltimore County delivered orally from the bench is set forth in Appendix A. No further written Opinion was delivered other than an Order by the Court of Appeals of the State of Maryland denying a Petition for a Writ of Certiorari.

JURISDICTION

U.S.C.A. Supreme Court Rules, Rule 38:

> "Review on writ of certiorari of decisions of state courts, circuit courts of appeals and the United States Court of Appeals for the District of Columbia".

QUESTIONS PRESENTED

In light of the recent Supreme Court decisions relating to the question of self-incrimination by a defendant, your Petitioner urges that the use of a machine to elicit information from a defendant which amounts to a confession should fall within the purview of the law regarding a defendant's constitutional right not to testify against himself. The issue in main is whether the State must comply in substance with the procedure as set forth in *Escobedo v. State of Illinois*, 378 U.S. 478, by informing the defendant of his constitutional rights prior to the use of such a machine.

A further question presented in this case would be whether or not the State has denied your Petitioner's constitutional rights by admitting testimony about the machine known as the breathalizer wherein the statute authorizing the said machine was not fully complied with.

STATEMENT OF FACTS

That on December 7, 1963, at approximately 6:45 p.m. your Petitioner, a sixty year old white male Caucasian, employed as an aircraft worker, was operating his 1962 Rambler Station Wagon on U.S. Route 40 near its intersection with U.S. Route 695, both being public highways in the County of Baltimore, State of Maryland. At that time your Petitioner was apprehended by Trooper Ira S. Combs, a member of the Maryland State Police, and charged with operating a motor vehicle under the influence of alcohol or drugs in violation of Section 206, Article 66½

of the Annotated Code of Maryland (1957) and Section 209 of the aforesaid Code constituting reckless driving. Your Petitioner was summoned to appear in the Fullerton Police Magistrates Court on December 9, 1963, at 10:00 a.m., where he was tried by Magistrate George Heffner and found guilty of both charges. At the time of his arrest Maryland State Police performed a series of tests wherein a machine described as the Breathalizer was employed and used to determine the alcoholic content of your Petitioner's blood system. Timely objections were entered by your Petitioner's attorney to the introduction of the Breathalizer evidence but said objections were overruled by the sitting magistrate.

An appeal was duly entered within the prescribed statutory ten (10) days to the Circuit Court for Baltimore County, State of Maryland, wherein trial was held on April 1, 1965, before the Honorable Judge W. Albert Menchine.

The testimony at that hearing of Trooper Ira S. Combs in part was as follows (T. 3-5)[1]:

> "A. Well, Your Honor, on the 7th of December, 1963, it was at approximately 6:30, 6:40 p.m. in the evening, I was patrolling northbound on State Route 700, which is Martin Boulevard. After passing the intersection of Compass Road, I observed a vehicle in front of me, which was, I believe, a Rambler. It was swerving back and forth in his lane of traffic. He was going from the slow lane to the fast lane, and then from to the right shoulder of the roadway and into the slow lane. I followed the subject for approximately one mile to a safe place to pull him over. At that time I got out, walked up to the vehicle and I asked the operator, which he identified himself as Mr. Wiesner, I said, 'Sir, are you sick or is something wrong?' He said, 'No, sir,

[1] T. indicates typed transcript of testimony.

there is not.' I said, 'Would you mind getting out of the car and coming back here,' so he got out and he walked out of the roadway behind my car, and I noticed him as he walked from his car, he was swaying a little, and I said, 'Have you been drinking?' He said, 'Yes, I have.' I said, 'Where have you been?' He stated, 'I have been at Oliver Beach to an oyster roast.' I asked him what time he had got there, and he said approximately 3:00 p.m., and I also asked him what he had been drinking. He stated he had been drinking beer. I said, 'How much?' He said, 'Four, five or six glasses,' so I asked him what time he left there. He said approximately 4:30 or 5:00 o'clock, and I asked him, I says, 'What time is it now?' He says, '7:25.' I asked him was he ill, and he stated, 'No,' and I asked him was he taking any kind of medication. He advised me that he was taking pills for asthma. I asked him when he had taken the last dose, and he said it was 7:00 o'clock that morning, and I asked him how much sleep he had the night before. He advised me he had twelve hours. So, at that time, his breath was very strong; the color of his face was flushed; his clothes were messed. His attitude was polite and cooperative. Unusual actions: he had profanity and belching."

Further testimony elicited from Trooper Combs is as follows (T. 6):

"A. His eyes were watery and his balance was swaying. He was staggering. The finger to nose test, he was uncertain. I asked him to hold out both arms and touch his nose, and he took his whole hand and touched his nose in this fashion (indicating). Picking up coin test, I did not give to him. His speech was slurred. At that time I advised the subject he would be charged with operating under the influence and reckless driving. I advised him of the breathalizer which he did not have to take, and he says, 'I am not drunk; I will take it.' At that time I called the barracks and advised them I was bringing a subject in for a breathalizer test."

Further testimony in relation to the above mentioned tests was elicited from Trooper Combs as follows (T. 9):

> "Q. Before you gave Mr. Wiesner these tests, did you inform him that he didn't have to take them? A. Didn't have to take which, sir?
>
> Q. The finger to nose test? A. No, sir, I didn't inform. I asked him if he would, and he said he would.
>
> Q. Did you inform him he didn't have to take them? A. No, sir, I didn't."

In the case of *Escobedo v. State of Illinois,* 378 U.S. 478, the question arose as to when a police investigation is no longer a general inquiry into an unsolved crime but has focused upon a particular suspect and the police attempt to elicit certain incriminating statements from the defendant and have not effectively warned him of his constitutional rights, the statement so elicited cannot be used against the defendant at the trial. The Court said:

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime, but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' Gideon v. Wainwright, 372 U.S. at 342, 83 S. Ct. at 795 and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."

At this point Trooper James A. Jones, a member of the Maryland State Police, took the stand and qualified as an

operator of the machine known as the Breathalizer. Article 35, Section 100, as amended by the 1957 Edition of the Annotated Code of Maryland states:

"(a) Admissibility of amount of alcohol in blood as shown by analysis; presumptions. — In any criminal prosecution for a violation of Section 206 of Article 66½ of this Code (1957 Edition, as amended from time to time) or for a violation of any other law of this State concerning a person who is under the influence of intoxicating liquor driving or attempting to drive any vehicle as specified in such other laws, any such person may be given a chemical test of his breath, blood or urine or other bodily substance for the purpose of determining the alcoholic content of his blood; provided, that the specimen of blood, breath or urine must have been taken within two hours after the person being prosecuted was first apprehended by the arresting officer; and that the test is administered *by qualified personnel with equipment approved by the toxicologist of the office of the chief medical examiner of the department of Post-Mortem Examiners at the direction of a police officer having reasonable grounds to believe the person to have been driving while under the influence of intoxicating liquor.* Qualified personnel means a physician, or police officer who has received training in the use of such equipment in a training program approved by the toxicologist of the office of the chief medical examiner of the Department of Post-Mortem Examiners. In any summary proceeding or criminal proceeding for which the defendant is charged with driving a motor vehicle while under the influence of intoxicating liquor, the amount of the alcohol in the defendant's blood, as shown by a chemical analysis as set forth in this section, which was conducted with equipment approved by the toxicologist of the office of the chief medical examiner of the Department of Post-Mortem Examiners, and operated by such qualified personnel, shall be admissible in evidence and shall give rise to the following presumptions:

1. If there was at that time in his blood five one-hundredths of one percentum (0.05%) or less, by weight, of alcohol, as determined by an analysis of his blood or breath, or if there was in his urine eight one-hundredths of one percentum (0.08%) or less by weight, of alcohol it shall be presumed that the defendant was not under the influence of intoxicating liquor.

2. If there was at the time of his blood test more than five one hundredths of one percentum (0.05%), but less than fifteen one-hundredths of one percentum (0.15%), by weight, of alcohol as determined by an analysis of his blood or breath, or if there was in his urine more than eight one-hundredths of one percentum (0.08%) but less than twenty one hundredths of one percentum (0.20%), by weight, of alcohol, such fact shall not give rise to any presumption that the defendant was or was not under the influence of intoxicating liquor, but such fact may be considered with other competent evidence in determining the guilt or innocence of the defendant.

3. If there was at the time in his blood fifteen one hundredths of one percentum (0.15%), or more, by weight, of alcohol, as determined by an analysis of his blood or breath, or if there was in his urine twenty one hundredths of one percentum (0.20%) or more by weight, of alcohol, it shall be prima facie evidence that the defendant was under the influence of intoxicating liquor.

(b) Introduction of other evidence: — The foregoing provisions do not limit the introduction of any other competent evidence bearing upon the question whether or not the defendant was under the influence of intoxicating liquor.

(c) Refusal to submit to test: — No person shall be compelled to submit himself or any part of his body or bodily substance for the purposes of a chemical analysis provided for in this section and evidence of chemical analysis shall not be deemed admissible if

obtained contrary to the provisions of this subsection; and no inference or presumption concerning either his guilt or innocence arises by reason of his refusal to submit as hereinbefore set forth, nor shall the fact of his refusal to so submit be admissible into evidence at his trial.

(d) Who may take blood specimen: — Only a physician, or qualified medical personnel, acting at the request of a police officer, or a person acting at the request of a physician, can withdraw blood for the purpose of determining the alcoholic content therein. This limitation does not apply to the taking of a breath test or a urine specimen.

(e) Additional test by physician chosen by accused: — The person tested shall be permitted to have a physician of his own choosing administer a chemical test in addition to the one administered at the direction of the police officer.

(f) Test results to be made available to accused: — Upon the request of the person who was tested, the results of the test will be made available to him before trial by an official certificate which shall be admissible in evidence.

(g) Duty of arresting officer to advise accused: — It shall be the duty of the arresting officer who charges a person with the operation of a motor vehicle while under the influence of intoxicating liquor, to advise the person so charged that he may, but need not, submit to a chemical analysis as provided for in this section.

(h) *Proof of approved equipment: — For the purpose of establishing that the test was administered with equipment approved by the toxicologist of the office of the chief medical examiner of the Department of Post-Mortem Examiners, as required by subsection (a) of this section, a statement signed by such toxicologist certifying that the equipment used in the test has been approved by him shall be prima facie evidence of such approval and such statement shall be admissible in evidence without the necessity of such*

toxicologist personally appearing in court. This section shall not preclude the right to introduce any other competent evidence bearing upon the date of the certificate or change in said equipment since the date of the said certificate (1959, ch. 769; 1961, ch. 595; 1962, ch. 81; 1963, ch. 16; 1964, ch. 166)." (Emphasis supplied.)

At this time Trooper Jones through direct examination by the State attempted to introduce evidence elicited by the use of the machine known as the Breathalizer. An objection was entered by your Petitioner's attorney on the grounds that no records were produced as required by the Code, Article 35, Section 100, Paragraph H, and the testimony went as follows:

(T. 17-18):

"Q. Do you know for a fact if the machine that the defendant was tested on—

(Mr. Austin) Objection, Your Honor.

Q. —was so certified?

(The Court) Overruled. The question is, do you know?

A. Do I know that it was certified?

Q. Yes, sir. A. At that time?

Q. Yes. A. No, sir, I don't know.

Q. You administered the test to the defendant on the date as you stated, is that correct? A. That's correct.

Q. And did you receive a reading as a result of this test?

(Mr. Austin) I will object, your honor.

(The Court) Overruled.

A. I did, sir.

Q. And what, if any — what was the result of the reading? A. Approximately a little over .20 per cent.

Q. .20 per cent?"

* * * * * *

(T. 19-20):

"Q. Then, as an expert operator, how would you know if the machine is operating satisfactorily? A. How would I know the machine is operating satisfactorily?

Q. Yes. A. Well, if you follow the steps that the manufacturer states that you must in the operation of the machine and you get a reading or an approximate result of the manufacturer says that you should get, it seems to me that this is an indication that the machine is working properly if you have tested it either prior or after running a subject on a known quantity of alcohol.

Q. Did you test it on this occasion? A. Afterwards.

Q. No, before? A. No sir, afterwards.

Q. You tested it afterwards but not before? A. That's right.

(Mr. Austin) Very well. No further questions, Your Honor."

At the conclusion of the trial in the Circuit Court for Baltimore County, motion for judgment of acquittal was made by your Petitioner's attorney which was refused by the Court and the judgment of the magistrate below was affirmed.

A timely motion for Writ of Certiorari was entered to the Court of Appeals for the State of Maryland and was refused on May 10, 1965.

ARGUMENT

PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND UNDER ARTICLE 23 OF THE DECLARATION OF RIGHTS OF THE MARYLAND CONSTITUTION WERE VIOLATED BY THE CIRCUIT COURT FOR BALTIMORE COUNTY ADMITTING EVIDENCE ILLEGALLY OBTAINED IN CONTRAVENTION TO THE LAWS OF THE STATE OF MARYLAND, AS A RESULT OF THE VIOLATION TO THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW AS AFORESAID ANY EVIDENCE OBTAINED THROUGH THE USE OF THE MACHINE KNOWN AS THE BREATHALIZER WAS INADMISSIBLE AS EVIDENCE AND THE STATE OF MARYLAND ERRED IN USING THE EVIDENCE TO SECURE A CONVICTION OF THE PETITIONER. THAT IF SAID EVIDENCE WERE NOT ADMITTED, THE STATE OF MARYLAND WOULD BE BARRED FROM PROSECUTING THE DEFENDANT PETITIONER FOR THE OFFENSE WITH WHICH HE WAS CHARGED.

In the case of *Escobedo v. State of Illinois,* 378 U.S. 478 it establishes in principle that a person unskilled in the administration of law or superior knowledge thereof has an absolute right to be informed of his constitutional rights prior to incriminating himself. There is in the instant case a defendant Petitioner who was admittedly from without the State of Maryland and unfamiliar with its laws and on a strange public highway as elicited through his testimony:

(T. 21-22):

"By Mr. Austin:

Q. What is your address, Mr. Wiesner? A. My address now, I am in a room with my daughter out on Broadway Road, I am from Colorado. I have been retired from the Martin Company, and I am here now, just came in."

* * * * * *

(T. 24-25):

"A. No, they drink them out of little glass, out of the keg. In fact, they poured it in a paper, and I can't

drink beer because I have asthma, and if I drink any amount, why, this tends to bring it out, and in fact, I stopped smoking. The doctor advised it. He couldn't cure it, he said. I was getting in trouble. He said, 'Stop smoking,' so I haven't smoked for eight years, and then later he said, 'Do you drink any alcohol?' I said, 'Once in a while I take a drink for my appetite.' He said, 'Cut that out. Maybe this will help,' so I haven't drank at all, so with the boys there, I figured with these oysters and the beer, I would indulge, and anyhow, I told them I was too cold. I didn't have heavy clothes on like I should have, and I said, "Well, I am going home because I am going to take my wife and the grandchildren out to supper.' I left and stopped up the road, which was about a half a mile, to my sister's house. She wasn't home, so I drove on up to Eastern Avenue, out Eastern Avenue to Martin Boulevard, and knowing this country well, because I worked at Martin's and I turned over at the Martin underpass and drove over to Pulaski Highway and in, but then I was getting bewildered because of this freeway; in other words, the beltway, I think it is called; knowing that if I missed that, I'd be in trouble because of traffic, and she lives way out here at Lutherville, so I was concerned about it, but about that time the heat from the car was bothering me and as soon as — and I opened the window up, and I carry what I call a medicine healer. This is a thing you squirt."

Your Petitioner when apprehended by the State Trooper was not given the opportunity to know or inquire as to the violation he was being charged with or the implication of any tests given him. Petitioner believes this to be in direct conflict with the case of *Escobedo v. State of Illinois,* 378 U.S. 478.

Further at the trial heard in the Circuit Court for Baltimore County the results of the machine known as the

Breathalizer admitted over your Petitioner counsel's objections even though the Code specifically states that the equipment used in such a test must be certified and inspected by the toxicologist of the chief medical examiners of the State of Maryland further indicating that such proof must be tangible and in writing. No such evidence was produced in the Circuit Court trial.

Therefore, your Petitioner contends that if the result of the Breathalizer were admitted as evidence and such machine was not properly inspected and certified it then must follow that the results of the machine must be taken as a form of confession elicited from your Petitioner and that your Petitioner has no way of knowing what his constitutional rights were under this set of circumstances. We then must contend that the physical tests as well as the machine tests were illegally obtained and admitted.

CONCLUSION

Petitioner respectfully asks that a writ of certiorari issue to the Circuit Court for Baltimore County, in order that Petitioner may be afforded the benefit of his constitutional rights as hereinbefore set forth.

Respectfully submitted,

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APPENDIX A

Opinion Below

The oral opinion delivered from the bench by the Honorable Judge W. Albert Menchine is as follows (T. 33 and 34):

> "Well, of course, in this case as in the one that was just most recently heard and determined, the description of the Trooper here was very graphic in telling of the manner in which his vehicle was operated upon the highway. I would think that most motorists upon the highway have had the frightening experience of coming upon a vehicle that is so operated upon the highway, and it is only a stroke of good fortune that the operator of this motor vehicle did not cause harm to himself or others, and only because of the patrolling car of the Trooper that its further movement upon the highways was prevented.
>
> The evidence persuades the mind of The Court beyond a reasonable doubt and to a moral certainty that the management, operation and control of this motor vehicle was indeed, influenced by the ingestion of alcohol. The verdict is guilty of the charge of operating a motor vehicle while under the influence of alcoholic beverage.
>
> I think that the circumstances are such as not to require an action with respect to the said charge of reckless driving because this is involved in the same offense, and the Court regards it as merged. I don't know whether this is technically accurate, but it seems to me that it would be pointless to charge this man with or to convict this man of two offenses so in 25863, the reckless driving offense, the verdict will be not guilty."

No further written decisions were delivered other than an Order by the Court of Appeals of the State of Maryland denying a Writ of Certiorari to that Court.

APPENDIX B

STATUTE

Article 66½, Section 206, Annotated Code of Maryland, 1957 Edition:

> "It shall be unlawful for any person who is an habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs to drive or attempt to drive any vehicle, streetcar or trackless trolley within this State.
>
> Every person who is convicted of a violation of this section shall be punished by imprisonment for not more than one (1) year, or by fine of not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00) or both fine and imprisonment. On a second or subsequent conviction he shall be punished by imprisonment for not less than six months nor more than two (2) years and in the discretion of the court, a fine of not more than one thousand dollars ($1,000.00)."